

KHAMARUL BAHRI YUSOFF

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v.

PAN NORTHERN AIR SERVICES SDN BHD

HIGH COURT MALAYA, ALOR SETAR

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SEE MEE CHUN JC

[CIVIL SUIT NO: 22-241-2007]

26 OCTOBER 2010

CONTRACT: *Loan - Agreement - Validity and enforceability of - Whether there was contravention of Moneylenders Act 1951 - Conflict of interest - Whether arose - No company resolution authorising agreement - Whether invalidated agreement - Whether there was an obligation on defendant to make repayments - Contracts Act 1950, s. 10(1) - Companies Act 1965, ss. 35(4), 67(1)*

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A loan agreement was entered into between the plaintiff and the defendant. Upon the defendant's request, the plaintiff had banked in RM1 million (the principal loan amount). The primary issue that arose herein was whether the loan agreement was valid and enforceable such that the plaintiff was entitled to the repayment of the money lent. The defence of the defendant was that the agreement was void for having contravened the Moneylenders Act 1951 and various provisions in the Companies Act 1965 such as conflict of interest and no company resolution authorising the agreement.

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Held (allowing plaintiff's claim with costs):

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(1) The evidence of DW1, managing director of the defendant, that he was not aware of the contents of the agreement, nor the RM1 million being banked in and the repayments made, were untenable. DW1 had signed the agreement. As managing director, DW1 was expected to know all the affairs of the defendant. Pursuant to s. 10 of the Contracts Act 1950, the agreement was valid. (para 4)

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(2) For the agreement to be unenforceable, the plaintiff must have been conducting business as a moneylender for which some sort of continuity or system or repetition of similar transactions was required. It could not be said that plaintiff, by entering into this one loan agreement, was conducting business as a moneylender. As a stand alone agreement, there was no continuity or system or repetition of similar transactions. The 30% profit margin even if construed as interest did not in the absence of the business element make the plaintiff a moneylender thereby subjecting him to the Moneylenders Act 1951. (paras 13 & 16)

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- A (3) It was adequately stated in the agreement that the plaintiff was a director of the defendant company. The plaintiff had also explained to the court's satisfaction that the amount of RM114,278 from the defendant was for reimbursement of an amount to some earlier transactions. Thus, there was no conflict of interest. (para 17)
- B (4) There was no company resolution authorising the agreement and the supplemental agreement. However, this was not fatal to the validity of the agreement. It was the defendant's obligation to pass the necessary resolutions. That these were not done was not the plaintiff's concern. Further, the absence of these resolutions did not detract from the obligation of the defendant to repay. (para 21)
- C (4a) The absence of a company seal made the supplemental agreement ineffectual pursuant to s. 35(4) of the Companies Act 1965 and cl. 5.3 contravened s. 67(1) which prohibits a company from dealing in its own shares. Assuming there had been such contravention thereby invalidating the supplemental agreement, the principal agreement remained intact. The fact remained that there was an obligation on the defendant to repay. (para 22)
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Case(s) referred to:

- E *Ngui Mui Khin & Anor v. Gillespie Bros & Co Ltd* [1979] 1 LNS 60 FC (*refd*)
Public Finance Berhad v. Lee Bee Rubber Factory Sdn Bhd & Ors [1994] 2 CLJ 646 HC (*refd*)
Serangoon Garden Estate Ltd v. Marian Chye [1958] 1 LNS 77 HC (*refd*)
Yeap Mooi v. Chu Chin Chua & Ors [1960] 1 LNS 169 FC (*refd*)

F Legislation referred to:

Companies Act 1965, ss. 35(4), 67(1)
Contracts Act 1950, s. 10(1)
Moneylenders Act 1951, ss. 2, 15
Moneylenders Ordinance 1950, s. 2

- G *For the plaintiff - Noor Syariman Othman; M/s Hoe & Ahmad Zaki*
For the defendant - Mohd Zainuddin Omar; M/s Arshad Azhari & Assocs

Reported by Suhainah Wahiduddin

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JUDGMENT

See Mee Chun JC:

- I [1] The primary issue is whether the loan agreement (the agreement) dated 19 July 2005 entered into between the plaintiff and the defendant company is valid and enforceable such that the plaintiff is entitled to the repayment of the money lent.

[2] The terms of the agreement stipulate that the plaintiff had upon the defendant's request lent the defendant RM1 million (the principal loan amount). The principal loan amount was to be repaid along with the profit margin (imbuhan keuntungan) at the rate of 30% per annum making it a total repayable amount of RM1.9 million. This was to be repaid in monthly installments of RM25,000 within 36 months from the signing of the loan agreement.

Whether Agreement Valid

[3] On the evidence presented the plaintiff had banked in RM1 million into the defendant's account on 26 July 2005. From August 2005 till sometime in 2006 the defendant had repaid RM350,000.

[4] The evidence of DW1 (Dato Ahmad Zabidi bin Md Zain, Managing Director, Director and shareholder of defendant) that he was not aware of the contents of the agreement, nor the RM1 million being banked in and the repayments made is untenable. DW1 signed the agreement. RM1 million and RM350,000 are substantial amounts and as Managing Director DW1 would be expected to know all the affairs of the defendant and not push it entirely to the plaintiff with the reason that the plaintiff was in charge of finance.

[5] *Serangoon Garden Estate Ltd v. Marian Chye* [1958] 1 LNS 77 is good authority for the proposition that when a party signs a contract knowing it to be a contract which governs the relations between them, his signature is irrefragable evidence of his assent to the whole contract. The case of *Public Finance Berhad v. Lee Bee Rubber Factory Sdn Bhd & Ors* [1994] 2 CLJ 646 applies with equal force here where at p. 652 it was stated:

... as directors and shareholders of the defendant company, it was their duty to know the nature and effect of the documents they were signing and thus it is impossible to give the slightest credence to their allegation that they were mistaken about the contents of the guarantee agreement ...

[6] Here too it is difficult to give any credence to the evidence of DW1 that as Managing Director and shareholder in the defendant company and as signatory to the agreement he is not aware of its contents.

[7] On the face of it and pursuant to s. 10 of the Contracts Act 1950 [Act 136] the agreement is valid. Section 10(1) provides that 'all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void'.

A Defendant's Case - Agreement Void

[8] I turn now to the defence of the defendant. The defendant has launched a multi-pronged attack on the agreement and states that it is void for having contravened the Moneylenders Act 1951 [Act 400] and various provisions in the Companies Act 1965 [Act 125] such as conflict of interest and no company resolution authorizing the agreement.

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Whether Agreement Void Under Moneylenders Act

[9] Defendant avers that the agreement is void as plaintiff is not a licensed moneylender under Act 400. Reference to s. 15 of Act 400 was made which provides as follows:

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Contract by unlicensed moneylender unenforceable

15. No moneylending agreement in respect of money lent after the coming into force of this Act by an unlicensed moneylender shall be enforceable.

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[10] At first glance by definition, plaintiff appears to be a moneylender within the meaning of s. 2 of Act 400 as he has lent a sum of money (RM1 million) to a borrower (defendant) in consideration of a larger sum (RM1 million + RM900,000) being repaid to him. However to subject him to Act 400 and in particular the pain of s. 15, the plaintiff must be conducting business as a moneylender. This is by virtue of the phrase "no person shall conduct business as a moneylender unless he is licensed" in s. 5 read together with the definition of 'moneylender' in s. 2.

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[11] It has been made clear in two Federal Court cases that Act 400 does not apply to moneylending transactions but to moneylenders. In *Ngui Mui Khin & Anor v. Gillespie Bros & Co Ltd* [1979] 1 LNS 60 it was stated at p. 12 as follows:

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At the outset we wish to observe that the Moneylenders Ordinance 1950 does not apply to moneylending but only to moneylenders. It does not make every moneylending transaction illegal and unenforceable. It is only a moneylending transaction of a moneylender which is the subject matter of the Ordinance and must comply with its provisions on pain of being declared illegal and unenforceable by the court ... He is a moneylender if within the meaning of s. 2 of the Ordinance he can be said to be a person "whose business is that of moneylending". To prove business requires some sort of continuity or system or repetition of similar transactions (*Chow Yoong Hong v. Choong Fah Rubber Manufactory*) ...

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[12] And again in *Yeep Mooi v. Chu Chin Chua & Ors* [1960] 1 LNS 169 the Federal Court reiterated that the Moneylenders Ordinance “does not strike at moneylending but at moneylenders and the loans lent by them. The Ordinance is never intended to apply to an individual, or any member of the public who lends money even at interest, unless he does so as a business”.

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[13] Hence for the agreement to be unenforceable, the plaintiff must have been conducting business as a moneylender for which some sort of continuity or system or repetition of similar transactions is required.

[14] On continuity the defendant contended that there had been a series of 20 loan transactions between the plaintiff and the defendant from May 2005 to early 2006. Reference was made to exh. D14 where a total of RM1.5 million was lent by the plaintiff to defendant with calculation on BLR @ 6.50 + 3. The plaintiff himself (PW1) explained these were in the form of cash advances to defendant which was in need of cash. Although defendant managed to show a healthy bank account I accepted plaintiff's evidence in view of the fact that defendant had secured a contract for The Supply of Airborne Platform Data Acquisition and Sensor Maintenance Services of MACRES Airborne Remote Sensing Programme and had obtained loan facilities. On the whole the 20 transactions were cash advance transactions not intended as a business.

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[15] On the BLR at 6.50 + 3, PW1 explained that the money came from overdraft facilities and whatever charged by the bank was charged back to defendant. This does not make it interest. Even if it was interest *Yeep's* case (*supra*) has made it clear that the Act does not apply to those who lend money with interest unless done as a business.

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[16] Without the earlier 20 transactions to prove the business of moneylending it cannot be said that plaintiff by entering into this one loan agreement was conducting business as a moneylender. As a stand alone agreement there is no continuity or system or repetition of similar transactions. The 30% profit margin even if construed as interest does not in the absence of the business element make the plaintiff a moneylender thereby subjecting him to the Act. Act 400 does not apply.

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Conflict Of Interest

[17] Defendant contends there was a conflict of interest as the plaintiff being a Director in the defendant company could not have entered into the agreement and that plaintiff had received RM114,278.06 from defendant. This situation has been adequately addressed in recital 1 to the agreement where it is stated that plaintiff is a director of the

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- A defendant company. On the amount of RM114,278.06 plaintiff had explained to the court's satisfaction this was reimbursement of an amount for reasons similar to the 20 transactions referred to earlier.

No Company Resolution

- B [18] There was no company resolution authorizing the agreement and the supplemental agreement (undated). I find this not fatal to the validity of the agreement as in recital five of the agreement it was stated as follows:

- C 5. Bahawa pihak kedua dengan ini bersetuju menyediakan dan mengeluarkan resolusi-resolusi untuk tujuan pinjaman prinsipal tersebut di mana kesemua resolusi yang dikeluarkan diluluskan oleh pengarah-pengarah syarikat pihak kedua.

- D [19] "Pihak kedua" refers to the defendant and recital five clearly makes it defendant's obligation to pass the necessary resolutions. That these were not done is not plaintiff's concern.

- E [20] Similarly the absence of the resolutions referred to in cl. 2 of the agreement relating to tenure of plaintiff's appointment as Director, plaintiff's signature required on accounts of particular amount and access to accounts and intended to be attached as Lampiran B does not impact the validity of the agreement. Clause 2 states as follows:

- F Pihak kedua bersetuju dan mengakui bahawa pada tarikh perjanjian ini ditandatangani, pihak kedua telahpun mengemukakan resolusi-resolusi berikut yang telah diluluskan oleh majoriti dari pengarah-pengarah pihak kedua ...

- G [21] Clause 2 is very clear that the resolutions referred to had been approved by a majority of defendant's board. Whether they had indeed been approved and its not been appended to the agreement is the defendant's responsibility. Further the absence of these resolutions do not detract from the obligation of defendant to repay.

Supplemental Agreement

- H [22] A specific issue on the supplemental agreement related to the absence of the company seal and cl. 1.1.4(iii) which inserted a new cl. 5.3 whereby in event of default by the defendant, the outstanding loan may be converted into fully paid up shares. The absence of the company seal makes the supplemental agreement ineffectual pursuant to s. 35(4) of the Companies Act 1965 and cl. 5.3 contravenes s. 67(1)

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which prohibits a company from dealing in its own shares. Assuming there has been such contravention thereby invalidating the supplemental agreement the principal agreement remains intact. The supplemental agreement was to address certain issues arising from default. The fact remains there is an obligation on defendant to repay.

Conclusion

[23] For the above reasons, plaintiff's claim is allowed with costs.

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